

**No. 13-20-00377-CV**

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FILED IN  
**IN THE 13<sup>TH</sup> COURT OF APPEALS**  
**CORPUS CHRISTI, TEXAS**

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Clerk

**CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO.  
NAJL05000016-H87, AS SUBROGEE OF MOMENTUM HOSPITALITY, INC. & 75  
AND SUNNY HOSPITALITY D/B/A FAIRFIELD INN & SUITES,  
*Appellant,***

**V.**

**D'AMATO CONVERSANO, INC. D/B/A DCI ENGINEERS,  
*Appellee.***

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Appeal from the 343rd District Court of Aransas County, Texas  
Trial Court Cause No. 19-0236

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**BRIEF OF DCI ENGINEERS**

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**Lorance & Thompson, PC**  
William K. Luyties  
Texas Bar 12711700  
wkl@lorancethompson.com  
Paul J. Goldenberg  
Texas Bar 240252382  
PJG@lorancethompson.com  
2900 North Loop West, Suite 500  
Houston, Texas 77092-8826  
713-868-5560

COUNSEL FOR APPELLEE D'AMATO  
CONVERSANO, INC. D/B/A/ DCI  
ENGINEERS

***Oral Argument is Not Necessary, but Unopposed***

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## **STATEMENT OF THE CASE**

<i>Nature of the Case</i>	In this subrogation case, Certain Underwriters is suing various Defendants for damages arising of alleged defective design and construction of a Fairfield Inn & Suites in Rockport, Texas. CR 144-289.
<i>Trial Court</i>	Hon. Janna K. Whatley 343 <sup>rd</sup> District Court of Aransas County, Texas
<i>Course of Proceedings</i>	Defendant Engineer moved to dismiss Certain Underwriters' causes of action because of Certain Underwriters' failure to file an appropriate certificate of merit as is required by Tex. Civ. Prac. & Rem. Code § 150.002. CR 294-316; 410-419.
<i>Disposition</i>	The trial court granted the motion to dismiss with prejudice. CR 420.

### **STATEMENT REGARDING ORAL ARGUMENT**

DCI Engineers does not believe that oral argument is necessary to decide this appeal but requests the opportunity to participate if the Court orders oral argument.

### **STATEMENT REGARDING JURISDICTION**

This Court has jurisdiction under section 150.002(f) of the Texas Civil Practice and Remedies Code, which permits interlocutory appeals of an order granting or denying a motion for dismissal.

### **ISSUES PRESENTED**

1. Did the trial court reversibly err by finding that DCI Engineers did not waive its right to file a motion to dismiss under Tex. Civ. Prac. & Rem. Code § 150 when it filed its motion only eleven months after lawsuit was filed, conducted general written discovery, did not take depositions, no trial date was set, and filed a motion for summary judgment?
2. Did the trial court abuse its discretion by dismissing the Underwriters' claims under Tex. Civ. Prac. & Rem. Code § 150.002 where Underwriters' certificate of merit was authored by a forensic civil engineer when it was required to be authored by a practicing structural engineer?

### **STATEMENT OF FACTS**

DCI Engineers was one of the structural engineers that worked on the design of a new Fairfield Inn & Suites in Rockport, Texas. CR 147. Soon after construction of the Hotel, Category 4 Hurricane Harvey hit the Texas coast and made landfall in Rockport on August 25, 2017. *Id.* Due to the severe storm, the Hotel suffered property damage. CR 147-148. The Hotel's insurer, Underwriters, paid for the property damage. CR 148.

Believing that the Hotel was defectively designed and constructed, Underwriters brought this subrogation action against the contractor, architect and structural engineers that were involved in the project. CR 144. DCI Engineers was a structural engineer on the project. CR 147. Underwriters alleged that DCI Engineers was negligent, grossly negligent, in breach of contract, and violated express or implied warranties by 1) improperly designing the hotel (including failing to provide proper support or bracing for the Hotel's stairwells or walls), and 2) failing to discover the incorrectly designed and/or constructed structures within the Hotel. CR 150-160.

Underwriters filed with its Petition, a certificate of merit by Bradley F. Coffman [CR 287-289]. Coffman states:

I am a registered professional engineer, licensed as a civil engineer in the State of Texas (No. 105940). I have more than 8 years of experience as a civil, structural, and forensic professional engineer (PE) or engineer in training (EIT). I am actively engaged in the practice of forensic engineering, which includes various components of structural engineering. I have in the past performed structural engineering designs for commercial structures, similar to the subject property, as, well as residential structures. My design work has primarily been for structures in high-wind areas, similar to Rockport, Texas, or high-seismic areas of the country. Accordingly, I have in the past engaged in the same areas of practice as engineers employed by DCI Engineers.

[CR 287]

DCI Engineers asked the trial court to dismiss Underwriters' case because the affidavit failed to meet the minimum requirements of Tex. Civ. Prac. & Rem. Code § 150. CR 294-316. Specifically, Coffman's Affidavit indicated that he does not currently practice in the same area as DCI Engineers—Coffman is a civil engineer who practices forensic engineering. Additionally, Coffman does not currently practice structural engineering, which is the area of practice of DCI Engineers.

After full briefing, the trial court granted DCI Engineer's motion to dismiss. CR 420.

## **STANDARD OF REVIEW**

### **Underwriters' Waiver Argument:**

Under a proper abuse-of-discretion review, waiver is a question of law. *Lalonde v. Gosnell*, 593 S.W.3d 212, 220 (Tex. 2019); *Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008). Appellate courts do not defer to the trial court on questions of law. *Id.* Deference must be afforded to the trial court's disposition of disputed facts, but when there are none, as here, review is entirely de novo. *Id.*

### **Underwriters' Argument on whether it met the standards of Tex. Civ. Prac. & Rem. Code § 150:**

The Court of Appeals reviews a trial court's decision to grant or deny a defendant's motion to dismiss under section 150.002 of the Texas Civil Practice and Remedies Code for abuse of discretion. *See WCM Group, Inc. v. Brown*, 305 S.W.3d 222, 229 (Tex. App.—Corpus Christi 2009, pet. dism'd); *Landreth v. Las Brisas Council of Co-Owners, Inc.*, 285 S.W. 3d 492, 496 (Tex. App.—Corpus Christi 2009, no pet.). A court abuses its discretion if it fails to analyze or apply the law correctly. *Dunham Eng'g, Inc. v. Sherwin-Williams Co.*, 404 S.W.3d 785, 789 (Tex. App.—Houston [14th Dist.] 2013, no pet.). A trial court abuses its discretion by acting arbitrarily, unreasonably, or without considering guiding principles. *Downer v. Aquamarine Operators Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). “A trial court has no discretion in determining what the law is or applying the law to the facts.” *Landreth*, 285 S.W.3d at 496. A trial court does not abuse its discretion when it bases a decision on conflicting evidence—rather, a factual decision is an abuse of discretion only if there is no evidence to support the decision.

*Whirlpool Corp. v. Camacho*, 251 S.W.3d 88, 102 (Tex. App.-Corpus Christi 2008), *rev'd on other grounds*, 298 S.W.3d 631 (Tex. 2009). “Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court does not demonstrate an abuse of discretion.” *Landreth*, 285 S.W. 3d at 496.

When the outcome of a case turns on a question of statutory interpretation, however, we review those questions *de novo*. See *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 491 (Tex. 2017). In construing a statute, our goal is to determine and give effect to the legislature’s intent. *Pedernal Energy*, 536 S.W.3d at 491 (citing *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012)). “We look to and rely on the plain meaning of a statute’s words as expressing legislative intent unless a different meaning is supplied, is apparent from the context, or the plain meaning of the words leads to absurd or nonsensical results.” *Id.*; *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 389-90 (Tex. 2014). Courts must presume that the legislature chose the statute’s language with care, including that words were chosen or omitted for a purpose, and we must construe statutes so that no part is surplusage, but so that each word has meaning. *Pedernal Energy*, 536 S.W.3d at 491-92; *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) (“The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.”). “We also take statutes as we find them and refrain from rewriting text chosen by the Legislature.” *Pedernal Energy*, 536 S.W.3d at 492 [citing *TRW Eng'rs, Inc. v. Hussion St. Bldgs., LLC*, No. 01-19-00895-CV, 2020 Tex. App. LEXIS 6110, at \*4-5 (Tex. App. Aug. 4, 2020)].

### **SUMMARY OF ARGUMENT**

Underwriters appeals the trial court's dismissal of its lawsuit against DCI Engineers by claiming that DCI Engineers waived its right to file a motion to dismiss under Tex. Civ. Prac. & Rem. Code § 150 and that its third-party professional's certificate of merit met the requirements of Tex. Civ. Prac. & Rem. Code § 150. DCI Engineers did not waive its right to file a certificate of merit and Underwriters' third-party professional did not meet the requirements of Tex. Civ. Prac. & Rem. Code § 150.

#### **There was No Waiver:**

There is no deadline for a defendant to challenge a plaintiff's certificate of merit. Although under extreme circumstances it is conceivable that a defendant can "waive" its right to file a motion to dismiss, those circumstances do not exist here. To show waiver, Underwriters must demonstrate that DCI Engineers had an actual intent to relinquish a right or intentional conduct inconsistent with the right, which it has not done. Further, no prejudice or harm has been done to Underwriters.

In this case, Underwriters cannot show any such intent. The cases finding waiver are extreme, such as waiting over three years, filing the motion on the eve of trial, after all discovery and deadlines had passed, experts were designated and deposed, and multiple mediations.

Those are not the facts in this case. DCI Engineers' motion to dismiss was filed only eleven months after the lawsuit was filed. There was never a trial date or scheduling order. No depositions had been taken. No deadlines had passed. No experts had been designated. No mediations occurred.

DCI Engineers filed a motion for summary judgment only two months after the suit had been filed on a single dispositive issue that both parties felt were necessary; however, no court has ever found that asking for summary judgment alone and by itself constituted waiver.

Because Underwriters has not shown any actual intent to relinquish a right by DCI Engineers or intentional conduct inconsistent with its right to seek dismissal under Tex. Civ. Prac. & Rem. Code § 150, the trial did not err in finding that there was no waiver.

**Underwriters' Certificate of Merit Did Not Meet the Requirements of Tex. Civ. Prac. & Rem. Code § 150:**

Under Tex. Civ. Prac. & Rem. Code § 150, Underwriters was required to file with its lawsuit a certificate of merit from a third-party engineer that *practices in the area of* DCI Engineers. There is no dispute that DCI Engineers is a structural engineering firm that was the structural engineer of record for the Hotel.

From his certificate of merit, it is clear that Underwriters' third-party engineer, Coffman, is a forensic civil engineer and is not practicing structural engineer. In fact, he says exactly this is his certificate of merit: "I am a registered professional engineer, licensed as a *civil engineer* in the State of Texas...I am actively engaged in the practice of forensic engineering, which includes various components of structural engineering. I have *in the past performed structural engineering*."

By this statement, it is clear that Coffman is not a structural engineer and cannot practice structural engineering. This is confirmed by the Texas Board of Professional Engineer's website that has Coffman listed as a "civil" engineer, which is contrasted with

DCI Engineers' engineer of record, who is designated as a "structural engineer." The TBPE Rules limit Coffman to practice only in his area of competence. Finally, the City of Rockport ordinances would not allow Coffman to stamp the structural plans that he complains about in this case. Accordingly, although he is an engineer, Coffman is not practicing structural engineering—the very area of which is the subject of his certificate of merit against DCI Engineers.

Additionally, Tex. Civ. Prac. & Rem. Code § 150 requires that Coffman "practices in the area of practice of the defendant." It is given that DCI Engineers is a structural engineering firm, so Coffman would need to be practicing structural engineering. Coffman's certificate of merit negates the possibility that he is currently practicing structural engineering. He is a civil engineer—not a structural engineer. Further, he is not practicing structural engineering: He expressly avers that in his affidavit: "I am actively engaged in the practice of forensic engineering... I have *in the past* performed structural engineering..."). This fails to meet the statutory requirement that of currently practicing in the area of DCI Engineering.

Finally, Underwriters' interpretation of the changes in the statutory requirement requiring the third-party professional from "practices in the *same* area of practice of defendant" to "practices in the area of practice of defendant" is non-sensical (deleting the word "same"). The plain meaning of the requirement remains the same—Coffman still must be practicing in the area of practice of DCI Engineers, which is structural engineering. Coffman is not a practicing structural engineer and fails to meet the requirements of the statute. Further, this is supported by the legislative history which

interpreted the statute as requiring the third-party professional “to actually practice in the *same* area of defendant.” Underwriters fails to cite any case law or other authority to support its interpretation of the applicable, current version of the statute. Coffman is required to be a currently practicing structural engineer and he is not. Therefore, the trial court correctly interpreted the statute and did not abuse its discretion by dismissing Underwriters’ suit against DCI Engineers.

## ARGUMENT

### **I. DCI Engineers timely filed its motion to dismiss under Tex. Civ. Prac. & Rem. Code § 150 and did not waive its right to do so.**

The burden to show waiver of a party's right to file a motion to dismiss under Tex. Civ. Prac. & Rem. Code § 150 is excruciatingly high and is not supported by the record in this case.

Underwriters points to two cases that it claims support its waiver argument. *Frazier v. GNRC Realty, LLC*, 476 S.W.3d 70 (Tex. App.—Corpus Christi 2014, pet. denied) involved a *pro se* architect that admitted in a request for admission that he was the architect that was responsible for designing the HVAC system and that the HVAC system was to be designed to a particular standard. Based on this admission, the court found that the architect's admission satisfied the purpose of Tex. Civ. Prac. & Rem. Code § 150 to deter meritless claims. Thus, the architect's admission had "substantially invoked the judicial process" and "waived his right to a certificate of merit." Clearly, DCI Engineers has not admitted to any liability for the claims being made in the underlying suit. In fact, DCI Engineers has expressly denied all liability for the claims being made by Underwriters. CR 365-368. *Frazier* does not apply because DCI Engineers has not waived its right to a certificate of merit by any admission of liability.

In the only case where the Supreme Court has found waiver of the right to file a Tex. Civ. Prac. & Rem. Code § 150 motion to dismiss, *Lalonde v. Gosnell*, 593 S.W.3d 212 (Tex. 2019), the facts were extreme and far beyond what exists in our case. In *LaLonde*, the Court found waiver because the engineer in that case filed its motion to

dismiss “late in the game,” “on the eve of trial” and 1,219 days after suit had been filed. *Id.* at 227. The motion to dismiss was filed after the discovery period had expired, even after extending the discovery period and expert deadlines. The parties engaged in two mediations. The engineer had designated experts, filed motions to designate third parties and amended discovery responses. “The Engineers advanced the litigation past the close of discovery to within one month of trial...” *Id.* at 228. “At the point the Engineers filed their dismissal motion, there was very little left of the judicial process to invoke except for an actual disposition on the merits.” *Id.*

None of these facts indicating possible waiver are found in our case. There was no pending trial date and none had been set. The motion to dismiss was filed only eleven months after the lawsuit was filed. No depositions had been taken. No experts had been designated by either side. No mediation took place.

As would be diligent and expected in these types of cases, all parties exchanged written discovery in the eleven months after filing of the lawsuit. DCI Engineers filed a motion for summary judgment based on the sole legal issue of a waiver of subrogation clause, which is further discussed below. Nothing that DCI Engineers did or did not do amounted to a waiver of its right to seek dismissal under Tex. Civ. Prac. & Rem. Code § 150.

Texas Courts have never found that a party waived its right to dismissal under Chapter 150 under the facts that exist in this case. In *Crosstex*, the Supreme Court recognized that there could be waiver by a defendant under the appropriate facts, but ultimately found that there was no waiver in that case. In *Crosstex*, the Court held that

litigation conduct is not necessarily inconsistent with a party's rights to imply an intent to relinquish those rights. In that case, the defendant moved for dismissal eight months into the suit, with six months to go before the close of discovery and more than seven months after docket call. *Id.* at 387. The defendant had filed an answer, exchanged discovery (Crosstex produced 11,000 pages of documents! *Id.* at 394) and agreed to a continuance, but the Court did not find waiver. *Id.* The *Crosstex* court struck down all of plaintiff's waiver arguments, holding:

- a. Engaging in Discovery: Quite simply, "attempting to learn more about the case in which one is a party does not demonstrate an intent to waive the right to move for dismissal." *Id.* at 394.
- b. Filing an Answer: Filing an answer is similarly inconsequential in the analysis. *Id.* *Crosstex* cited another case that "it was not inconsistent or unreasonable for the defendant to answer before moving to dismiss. We should not penalize parties or their attorneys for acting out of an abundance of caution and protecting their interests by filing an answer." *Id.*; *Palladian Bldg. Co. v. Nortex Found. Designs, Inc.*, 165 S.W.3d 430, 434-35 (Tex. App.—Fort Worth 2005, no pet.).

In another case where waiver was claimed, the Court found there was no waiver when the defendant waited two years and five months to file a motion to dismiss, defendant participated in discovery, defendant designated its expert witnesses, filed traditional and no-evidence motions for summary judgment, participated in mediation,

and participated in various pre-trial activities. *Ustanik v. Nortex Found. Designs, Inc.*, 320 S.W.3d 409, 413 (Tex. App.--Waco 2010, pet. denied).

In yet another case where waiver was claimed, but the Court found no waiver, the defendant “waited more than a year after they were sued to file their motion to dismiss” and “participated in the litigation process” before they filed their motion. The Court held that “the record “reveals no action by [defendants] that would preclude them from seeking dismissal” under Chapter 150. *DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407, 411 (Tex. App.--Dallas 2010, pet. denied.)

In *Landreth* at 500, this Court found that there was no waiver where there was “participation in discovery, taking depositions, and filing a motion for summary judgment.” In fact, it was only after plaintiff’s expert’s deposition was taken that the defendant filed its motion to dismiss. Noting that Chapter 150 has no deadline for filing a motion to dismiss and that the plaintiff’s expert had just been recently deposed, and his lack of qualifications were discovered, the Court found that there was no evidence that the defendant waived its right to dismissal.

The instant case was on file for eleven months before the motion to dismiss was filed. No trial date had been set, there was no scheduling order, or a continuance. Further, no experts have been designated by any party (nor has there been a deadline set for doing so). No depositions of any witnesses had been taken. In many ways, especially due to the worldwide Coronavirus pandemic that has paralyzed litigation for the past seven months, this case is in its infancy compared to the facts in *Crosstex*; *Ustanik*, *Weaver*, and *Landreth*. Each of these cases held that there was no waiver.

To waive a right, a party must clearly communicate its intent to relinquish or abandon the right. *Lalonde*, 593 S.W.3d at 230; *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511 (Tex. 2015). Under the facts of this case, there has never been any communication of an intention to relinquish or abandon DCI Engineers' right to seek dismissal under Chapter 150. No Texas court has found waiver under these facts and should not do so now. At its core, the Underwriters is essentially asking the Court to excuse its noncompliance with a fundamental and statutory requirement for suits against professional engineers because DCI Engineers did point out their fatal flaw on day one.

Underwriters argues waiver based on three specific acts or non-actions by DCI Engineers. However, none these acts or non-acts demonstrate that DCI Engineers waived its right to file a motion dismiss under Tex. Civ. Prac. & Rem. Code § 150 and no Texas court has found waiver for the reasons given by Underwriters.

Not Complained of in DCI Engineer's Answer: Underwriters claims that DCI Engineers waived its right to file a motion to dismiss because defects in the Coffman Affidavit were not alleged in DCI Engineers' answer. However, Underwriters cannot point to any statute or Texas case that requires the answer to contain or mention defects in a certificate of merit. Tex. Civ. Prac. & Rem. Code § 150 does not impose any such requirement.

Both cases cited by Underwriters, *City of El Paso v. Mountain Vista Builders, Inc.*, 557 S.W.3d 617 (Tex. App.—El Paso 2017, no pet.) and *Tex. Dep't of Health v. Rocha*, 102 S.W.3d 348 (Tex. App.—Corpus Christi 2003, no pet.) concerned affirmative defenses that were required to be pled in an answer by statute. Such is not the case here.

There is no statute or case law supporting Underwriters' assertion that DCI Engineers' right to file a motion to dismiss under Tex. Civ. Prac. & Rem. Code § 150 was waived because DCI Engineers did not mention the defects in the Coffman Affidavit in its answer.

DCI Engineers filed a general denial in its answer which put all matters in issue. Tex. R. Civ. P. 85, 92; *Shell Chem. Co. v. Lamb*, 493 S.W.2d 742, 744 (Tex. 1973) (“[A] general denial puts [plaintiff] on proof of every fact essential to his case and issue is joined on all material facts asserted by [plaintiff] except those which are required to be denied under oath.”).

Finally, as noted above, the filing an answer is inconsequential to the waiver analysis. *Crosstex* at 394. In *Palladian*, the court concluded that “We conclude it was not unreasonable or inconsistent for [defendant] to elect to file an original or amended answer prior to filing its motion to dismiss for [plaintiff’s] failure to file the required expert’s affidavit.” *Id.* At 434-435. The Supreme Court has cautioned that “We should not penalize parties or their attorneys for acting out of an abundance of caution and protecting their interests by filing an answer. *Crosstex*, 430 S.W.3d at 394.

DCI Engineers Filed its Motion After Other Defendants: Second, Underwriters makes the baseless argument that because other defendants moved to dismiss the cases against them before DCI Engineers, such constituted waiver on the part of DCI Engineers. There is no required “race to the courthouse” to file a motion to dismiss before a co-defendant files their motion. Again, Underwriters fails to cite any statute or case that supports the position that, because other defendants filed their motion to dismiss first,

DCI Engineers must have waived its right to file the same motion. Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Crosstex*, 430 S.W.3d at 393-394. As such, the fact that another defendant filed its motion to dismiss before DCI Engineers does not constitute an intentional relinquishment of the right to file a motion to dismiss. Simply, had DCI Engineers filed its motion to dismiss before the other defendant filed their same motion, would Underwriters be claiming that the other defendant had waived its rights?

DCI Engineers Filed a Motion for Summary Judgment: Underwriters claims that DCI Engineers waived its right to file a motion to dismiss under Tex. Civ. Prac. & Rem. Code § 150 because DCI Engineers filed a motion for summary judgment on the issue of equitable subrogation before filing the motion to dismiss.

The Texas Supreme Court case that Underwriters relies on for this proposition is *Lalonde*, which is discussed above. Of course, *Lalonde* made it clear that “the right to dismissal under section 150.002 is clear and unequivocal.” *Id.* at 225. In *Lalonde*, the Court said that filing a merits-based disposition may be conduct inconsistent with the right to dismissal of the case without litigation, without regard to the merits. *Id.* However, this single act does not constitute waiver. As discussed above, the *Lalonde* Court was looking at a mountain of possible waiver facts that are not present in this case.

The filing a motion for summary judgment by itself is not dispositive of the waiver issue. *Ustanik* at 414.. Further, this Court in *Landreth* refused to find waiver in a case where a motion for summary judgment was filed. *Id.* At 500. This Court further noted

that Tex. Civ. Prac. & Rem. Code § 150 was silent with regard to a deadline to file a motion to dismiss.

As noted in the briefing in the trial court, Underwriters actually invited the disposition of the equitable subrogation issue early on in the case. Within two months of filing the suit, the parties agreed it was critical to deal with the equitable subrogation issue early to avoid unnecessary time and expense. In a telephone call on September 23, 2019, Underwriters' counsel, Michael Marx, agreed it would be best to deal with the waiver of subrogation issue before trying to engage in possible settlement discussions.

In considering the "totality of the circumstances," DCI Engineers' filing of its motion for summary judgment does not indicate that DCI Engineers was relinquishing or abandoning the right to file a motion to dismiss under Tex. Civ. Prac. & Rem. Code § 150. No Texas Court has found waiver under the facts in this case and should decline to do so now.

- II. The trial court did not abuse its discretion by dismissing Underwriters' claims under Tex. Civ. Prac. & Rem. Code §150.002 where Underwriters' Certificate of Merit was required to be authored by a structural engineer that currently practices structural engineering, but instead was authored by a civil engineer that is not practicing structural engineering.**
- A. The third-party professional was required to be a structural engineer practicing structural engineering. However, he was a civil engineer that was not practicing structural engineering.**

DCI Engineers is a structural engineering firm and was the structural engineer of record for the Fairfield Inn & Suites in Rockport. CR 145-146. DCI Engineers is licensed by the State of Texas as an engineering firm that practices in the area of structural engineering. CR 302. Kristopher Swanson was DCI Engineers' engineer of record for this Project and is licensed Professional Engineer by the State of Texas designated as practicing structural engineering. CR 302.

Underwriters' cause of action arises out of the alleged provision of professional services by a licensed professional structural engineer, *i.e.* Defendant DCI Engineers. Underwriters' lawsuit alleges "Upon information and belief, Defendant DCI Engineers served as the *structural* engineer responsible for the original *structural* engineering/approval of the Hotel." CR 147 [emphasis added].

Underwriters filed with its Petition a certificate of merit by Bradley F. Coffman [CR 287-289]. Relevant to the issue in this appeal, Coffman states:

**I am a registered professional engineer, licensed as a civil engineer in the State of Texas (No. 105940). I have more than 8 years of experience as a civil, structural, and forensic professional engineer (PE) or engineer in training (EIT). I am actively engaged in the practice of forensic engineering, which includes various components of structural engineering. I have in the past performed structural engineering designs for commercial structures, similar to the subject property, as, well as residential structures. My design work has primarily been for**

structures in high-wind areas, similar to Rockport, Texas, or high-seismic areas of the country. Accordingly, I have in the past engaged in the same areas of practice as engineers employed by DCI Engineers. [bold added]

[CR 287]

There is no dispute that the applicable and current version of Tex. Civ. Prac. & Rem. Code § 150 (2019) requires that the third-party professional “holds the same professional license or registration as the defendant” and “practices in the area of practice of the defendant.” Tex. Civ. Prac. & Rem. Code § 150.002(a)(2),(3). CR 315. This is the key statutory language at dispute in this appeal. Because Coffman did not meet these requirements, the trial court dismissed Underwriters’ claims against DCI Engineers.<sup>1</sup> CR 420.

The Court granted DCI Engineer’s motion to dismiss Underwriters’ lawsuit for Underwriters’ failure to comply with Tex. Civ. Prac. & Rem. Code § 150. In his Affidavit, Coffman reveals that (a) he does not practice in the same area of engineering as DCI Engineers and (b) he does not actively practice structural engineering.

*i. Coffman cannot practice structural engineering.*

Coffman is a licensed professional engineer. However, his Affidavit shows that he is a civil engineer who practices in the area of forensic engineering. CR 306. ***Coffman is not a structural engineer.*** In fact, the Texas Board of Professional Engineers’ website shows that Coffman is a ***civil*** engineer [CR 415]:

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<sup>1</sup> The statute requires “A claimant’s failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.” § 150.002(e).

COFFMAN, BRADLEY FORSYTHE		PE# 105940
Status	Branch(s)	Granted
Active	Civil	06-08-2010

The difference between Coffman and the DCI Engineers' engineer, Kris Swanson, PE, becomes apparent when we look at Swanson's same listing with the Texas Board of Professional Engineers [CR 415].

SWANSON, KRISTOPHER ROY		PE# 101673
Status	Branch(s)	Granted
Active	Structural	10-16-2008

Coffman is not a structural engineer currently practicing structural engineering and that's important because, by law, he cannot practice structural engineering. This is not a "civil engineering" case—this case involves a wall falling down and the structural aspects of that wall (wind load design and construction). This case is about wind load design and construction. In fact, Coffman would be precluded from stamping wind load designs in the City of Rockport as per the City of Rockport Building Inspection Plan Submittal Procedures. CR 311-313. Paragraph 6 of these procedures reads in relevant part as follows:

Since AUGUST 1, 2006 all plans submitted for approval shall have a structural engineer seal for wind load requirements, or shall include a letter from the engineer. In addition, no certificate of occupancy shall be issued without documentation of completion of wind load requirements.

Thus, Coffman cannot even stamp the structural drawings he is relying upon to indict DCI Engineers in these proceedings because he is not a licensed structural

engineer. Coffman as a civil engineer cannot engage in the same area of practice as Defendant DCI Engineers. CR 302-303.

Although Coffman is a Professional Engineer, engineers “shall practice only in their areas of competence.” TEX. ADMIN. CODE § 133.97(h) & 137.59(a). As a civil engineer, Coffman has different knowledge, skills, experience, education, training and practice than DCI Engineers’ Swanson and, therefore, is not qualified to make a certificate of merit against DCI Engineers. Because the Texas Administrative Code requires engineers to practice only in their areas of competence, Coffman cannot go outside of his area of expertise, which is civil engineering. Further, Coffman’s affidavit does not set out his level of competence in the field of structural engineering, if any.

*ii. Coffman is not actively practicing structural engineering.*

Coffman must show that he is actively practicing structural engineering. The statute requires that the third-party professional be one who “practices in the area of practice of the defendant.” See sec. 150.002(a)(3). As shown above, Coffman cannot legally practice as a structural engineer. Additionally, he has not shown in his Affidavit that he is currently practicing structural engineering. His affidavit claims that he is “actively engaged in the area of forensic engineering,” and

**I have in the past performed structural engineering** designs for commercial structures, similar to the subject property ... CR 287 [emphasis added].

Coffman does not say or claim that he is practicing as a structural engineer in his Affidavit. He claims that he has “in the past” performed structural engineering designs. This fails to meet the statutory requirement that he currently “practices in the area of

practice of defendant” DCI Engineers. There is nothing showing that Coffman fulfills the statutory requirement of currently practicing in the area of practice as DCI Engineers (structural engineering).

Because Coffman is a civil engineer and (1) is not allowed by the Texas Administrative Code to practice structural engineering and (2) he has admittedly only practiced structural engineering in the past, he cannot now claim that he practices structural engineering, the same area of practice as the project’s structural engineer in this case, DCI Engineers.

**B. “Practicing in the area of practice of the defendant” is the same as “Practicing in the *same* area of practice of the defendant.”**

Underwriters argues that the new requirement that the third-party engineer be “practicing in the area of practice of the defendant” is somehow different than the former requirement that he is “practicing in the *same* area of practice of the defendant.” There is no difference.

Underwriters’ Brief walks this Court through the changes in the statute over the past 15 years and their recitation is generally correct, so there is no need to repeat the same here. In short, the statute first required the third-party professional to be “practicing in the same area of practice as the defendant.” Subsequently, the statute was amended to require the third-party professional to only be “knowledgeable in the area of practice of defendant.” In the latest version, which is applicable here, the Legislature raised the requisite level of the third-party professional so that it must be someone who “**practices in the area of practice** of defendant.” As admitted in Underwriters’ Brief, this means

that the “third-party professional must practice in the defendant’s field.” Appellant’s Brief 16. Despite this admission, Underwriters claims that the statute does not require the third-party professional to practice in the “same” field as defendant. *Id.* 16-17.

Underwriters’ position defies logic and ignores the plain meaning of the statute. The “area of practice” of DCI Engineers is that of structural engineering. When the statute says that the third-party professional must be one who “practices in the area of practice of defendant,” it is clearly and unambiguously saying that the third-party professional making the affidavit must practice in the same area of practice of defendant. In this case, that is structural engineering, which Coffman cannot practice (for the reasons set forth above).

Perhaps most persuasive on this issue of what the current statute means is the Bill Analysis, June 12, 2019, for the current version of the statute, which states that the new law “would require the affiant to **actually practice in the same area as the defendant**, which would mean the affiant has experience in the area...” Appellant’s Appendix 51. This Bill Analysis flies in the face of Underwriters’ argument that “practices in the area of the defendant” does not mean “practices in the *same* area of the defendant.”

The two cases cited by Underwriters to support their proposition are not analogous and both examined wholly different versions of the statute with different standards. Both cases looked at the 2009-2019 version that required the affiant “be knowledgeable in the area of practice of the defendant...”. In fact, this Court in Underwriters’ cited *BHP Eng’g & Constr., L.P. v. Heil Constr. Mgmt* case, actually interpreted the “*in the area of practice*” language to mean “*in the same area of practice*” of the defendant (“The affiant

must... be knowledgeable *in the same area of practice* of the defendant.”) No. 13-13-00206-CV, 2013 Tex. App. LEXIS 14672, at \*13 (Tex. App. Dec. 5, 2013). In *BHP Eng’g*, the issue was whether the third-party professional engineer was “knowledgeable in the area of practice of the defendant,” who was a chemical engineer. The third-party professional making the affidavit was a structural engineer, but he showed in his affidavit that he was also an architect, had 30-years’ experience in designing complex hazardous material storage facilities,” and had expertise in “engineering design, failure analysis, construction and facilities management and cause and origin of building component failures.” *Id.* at 13-14. Based on these facts, this Court determined that the third-party professional, who was “a licensed engineer and registered architect in Texas, has experience designing hazardous material storage structures. His expertise also includes failure analysis and determining the cause and origin of structure failure.” At no point did the *BHP Eng’g* Court take the position that Underwriters now urges this Court to adopt: that the third-party professional is not required to practice in the area of practice of the defendant. The current statute expressly requires this.

In Underwriters’ second case that purportedly supports its position, *Dunham*, the court was again looking at the older version of the statute that required the affiant “be knowledgeable in the area of practice of the defendant...” In this case involving the type of paint that was to be used on a city water tank, a paint company sued the city’s civil engineer and attached a certificate of merit from a third-party civil engineer asserting that the city engineer’s paint specifications violated the competitive bidding requirements. The defendant engineer asked the court to dismiss the case under Tex. Civ. Prac. & Rem.

Code § 150 because the third-party civil engineer did not demonstrate that he was knowledgeable in the area of practice of the defendant engineer. The trial court denied the motion to dismiss and the defendant engineer appealed. The defendant engineer claimed that the third-party engineer was required to demonstrate that he was knowledgeable in “professional engineering services related to water storage tanks and corrosion control.” The *Dunham* Court rejected the defendant engineer’s very narrow interpretation of the “knowledgeable in the area of practice” requirement.

The *Dunham* Court focused on the actual language of the applicable statute, which only required that the affiant “be knowledgeable in the area of practice of the defendant...” The court rejected the defendant engineer’s contention that the third-party professional be an expert in water tank painting. The Court reasonably noted that the third-party professional was not required to demonstrate expertise in the defendant’s sub-specialty. The Court also recognized that the applicable version of the statute did not require that the affiant practice in the same area of defendant engineer, which was true under the older version of Tex. Civ. Prac. & Rem. Code § 150. *Dunham* merely looked at the plain language of the statute requiring that the affiant be *knowledgeable* in the area of practice of the defendant. The statute has been changed and that is not the standard before this Court.

In our case, the third-party engineer is a civil engineer who does forensic engineering and admittedly is not a practicing structural engineer as is required by Tex. Civ. Prac. & Rem. Code § 150.

## CONCLUSION & PRAYER FOR RELIEF

Tex. Civ. Prac. & Rem. Code § 150 requires that the third-party engineer must be one that “practices in the area of the defendant.” In our case, as shown above, Coffman is a forensic civil engineer and (1) is not allowed by the Texas Administrative Code to practice structural engineering and (2) he has admittedly only practiced structural engineering in the past—he cannot now claim that he practices structural engineering, the same area of practice as the project’s structural engineer in this case, DCI Engineers. Therefore, Underwriters’ certificate of merit did not meet the requirements of Tex. Civ. Prac. & Rem. Code § 150 and the court did not abuse its discretion by dismissing Underwriters’ case against DCI Engineers.

For these reasons, DCI Engineers asks that the trial court be affirmed and requests all other relief to which it is entitled.

**LORANCE & THOMPSON, PC**



By: \_\_\_\_\_

William K. Luyties  
Texas Bar 12711700  
wkl@lorancethompson.com  
Paul J. Goldenberg  
Texas Bar 240252382  
PJG@lorancethompson.com

2900 North Loop West, Suite 500  
Houston, Texas 77092-8826  
713-868-5560

COUNSEL FOR APPELLEE D’AMATO  
CONVERSANO, INC. D/B/A/ DCI ENGINEERS

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1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4 because it contains 8,561 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(2).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 13 point font.

Dated: October 27, 2020.



By: \_\_\_\_\_  
Paul J. Goldenberg

### CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that on October 27, 2020, a true and correct copy of the foregoing Brief of Appellee DCI Engineers has been served on counsel of record by e-filing, addressed as follows:

**Counsel for Appellants:**

Paul B. Hines  
DENENBERG TUFFLEY, PLLC  
28411 Northwestern Hwy. Suite 600  
Southfield, MI 48034  
[phines@dt-law.com](mailto:phines@dt-law.com)  
[emalinowski@dt-law.com](mailto:emalinowski@dt-law.com)  
[mmarx@dt-law.com](mailto:mmarx@dt-law.com)  
[ftyson@dt-law.com](mailto:ftyson@dt-law.com)  
[dseldon@dt-law.com](mailto:dseldon@dt-law.com)



By: \_\_\_\_\_  
Paul J. Goldenberg

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Mindy Adams on behalf of Paul Goldenberg  
Bar No. 24025382  
ma@lorancethompson.com  
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Associated Case Party: Certain Underwriters at Lloyd's of London Subscribing to Policy No. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,

Name	BarNumber	Email	TimestampSubmitted	Status
Paul BHines		phines@dt-law.com	10/27/2020 3:53:50 PM	SENT
Evan J.Malinowski		emalinowski@dt-law.com	10/27/2020 3:53:50 PM	SENT
Michael R.Marx		mmarx@dt-law.com	10/27/2020 3:53:50 PM	SENT
Davette Seldon		dseldon@dt-law.com	10/27/2020 3:53:50 PM	SENT
Felicia Tyson		ftyson@dt-law.com	10/27/2020 3:53:50 PM	ERROR

Associated Case Party: D'Amato Conversano, d/b/a DCI Engineers, and Mayse & Associates, Inc

Name	BarNumber	Email	TimestampSubmitted	Status
Paul JGoldenberg		PJG@lorancethompson.com	10/27/2020 3:53:50 PM	SENT
Richard ACapshaw		richard@capslaw.com	10/27/2020 3:53:50 PM	SENT
Stanhope BDenegre		stan@capslaw.com	10/27/2020 3:53:50 PM	SENT
Mark A.Youngjohn		myoungjohn@donatominxbrown.com	10/27/2020 3:53:50 PM	SENT
Aaron Pool		apool@donatominxbrown.com	10/27/2020 3:53:50 PM	SENT
William KLuyties		WKL@lorancethompson.com	10/27/2020 3:53:50 PM	SENT